UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, New York, N.Y.

v. S14 11 Cr. 1091 (VM)

PETER LESNIEWSKI, MARIE BARAN
and JOSEPH RUTIGLIANO,

Defendants.

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July 17, 2013
4:40 p.m.

Before:

HON. VICTOR MARRERO,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
BY: JUSTIN S. WEDDLE
DANIEL BEN TEHRANI
NICOLE WARE FRIEDLANDER
Assistant United States Attorneys

LAW OFFICES OF JOSHUA L. DRATEL, P.C.
Attorneys for Defendant Peter Lesniewski
BY: JOSHUA LEWIS DRATEL
LINDSAY A. LEWIS

DURKIN & ROBERTS
Attorneys for Defendant Peter Lesniewski
BY: THOMAS ANTHONY DURKIN

APPEARANCES CONTINUED

KOEHLER & ISAACS, LLP
Attorneys for Defendant Marie Baran
BY: JOEY JACKSON

JOSEPH W. RYAN, JR.
KEVIN MENEILLY
Attorneys for Defendant Joseph Rutigliano

- also present -

Annie Chen
Emma Larson, Government Paralegals

SA Frank LoMonaco, FBI

Yeni Yrizarry, Defendant Baran Paralegal

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(A jury of twelve and two alternate was duly impaneled and sworn)

THE COURT: I am going to give you some very preliminary remarks that will serve as an introduction to the trial. This will take possibly around 20 minutes or so.

At that time it will be roughly 5 o'clock. I will then adjourn for the day and ask you to return tomorrow at 9. Be prepared tomorrow to stay until about 6:00. We are trying to see if we can make up some of the time that we have lost by virtue of the length of time that it took for the selection of the jury. Given the circumstances that you know and are aware of, it took much longer than we anticipated.

We are also going to meet for a full day on Friday, until 5. I will let you know about the schedule for the following week as it develops, but be prepared to meet the entire week.

Now, these instructions are not a substitute for the detailed instructions on the law and the evidence that I will give you at the conclusion of the case before you retire for your deliberations. Rather, these remarks are a simple explanation of your duties and responsibilities and the basic principles of law which are likely to be involved in this case.

As a preliminary matter, we will review the schedule with you again. As I indicated, we expect the trial to last approximately six to seven weeks. We will make every effort

possible to streamline and save time in order to maintain within that time frame and if at all possible even to shorten it in any way that we can.

We will begin each day at 9 a.m., unless I indicate otherwise, and we will continue until 5 p.m. on most days, again, unless I indicate otherwise.

It is extremely important that you allow sufficient time in the morning to ensure that you arrive by 9 a.m., because the trial cannot start without all of you being present in the jury room and here, and delays could result in our having to stay later on any particular day or stay later beyond the six or seven weeks we are talking about. We would like to avoid that if at all possible.

You can do your part by being here on time and not letting your delays cause an extension. To the extent that there are delays caused by jury lateness, we may need to respond to that by lengthening the days or shortening the breaks and the lunch so that we maintain within the time frame that we have allotted.

We will take a lunch break every day at around 1 o'clock for roughly an hour, and we will take ten-minute breaks in the midmorning and midafternoon, roughly around 11, 11:30 or around 3 o'clock for so.

If at any time any of you wants the Court to declare a brief recess for any reason, just raise your hand and let me

know and we will take a brief recess, no questions asked. We will be glad to accommodate such requests.

Your purpose as jurors is to find and determine the facts that are at issue in this case. The jury is the sole judge of facts in the case. Your task is to decide factual issues based on the evidence presented and then to apply the facts as you find them to the law as contained in my instructions to you at the conclusion of the trial.

As I mentioned during the jury selection process, the question of punishment is for the Court alone to determine, and must not enter into your deliberations on the guilt or innocence of any defendant.

You may not speculate as to the potential punishment or sentence that any defendant you are considering may face in connection with the charges against him or her brought by the government, nor may you consider the question of punishment when you apply the facts to the law during your deliberations.

While you are the judges of the facts, the Court is the sole judge of the law. In other words, it is my duty to preside at the trial to rule on various legal issues that may come out during the course of the trial and to instruct you on the legal principles that you are to apply to the facts as you find them.

The law as given by the Court constitutes the only law for your guidance, and it is your duty to follow the law as I

give it to you. You are to determine the facts in the case solely from the evidence, which consists of the sworn testimony of witnesses regardless of which party may have called them, any video recordings, audio recordings, documents and physical things that have been received in evidence, regardless of who may have produced them, all facts which may be judicially noticed, and all facts which the parties have stipulated to and which I instruct you to take as truthful for purposes of the case.

Later on I will indicate the meaning of some of these terms, such as stipulation and judicial notice.

Evidence is a very specific and limited concept. Not everything that you see or hear in a courtroom is evidence. For instance, what I say now or later is not evidence. Also, what the lawyers say in their opening statements and closing arguments is not evidence. To put it affirmatively, evidence consists of the answers given by the witnesses from the witness stand under oath.

It is the answer that is the evidence, not the question or how the question was asked. Obviously, to evaluate the answer, you have to consider the question to which it is a response.

As I mentioned statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation, which means that the attorneys agree to a certain

fact. When the attorneys on both sides stipulate, or agree, to the existence of a fact, I will instruct you that you must accept the stipulation as evidence and regard the fact as proved.

On occasion I may tell you that I am taking judicial notice of certain facts or events. You may, but are not required to, accept as conclusive any fact that the Court may judicially notice.

You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited only to statements of witnesses. In other words, you are not limited solely to what you see or hear as the witness testifies. You are permitted to draw from the facts which you find to have been proved such reasonable inferences as you feel are justified in light of your experiences.

Your decision on the facts in the case should not be determined by the number of witnesses testifying for or against the party. You should consider all of the facts and circumstances in evidence to determine which of the witnesses you choose to believe and not to believe. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

Finally, keep in mind that you are not to consider anything that you may have read or heard about in the case

outside of the courtroom as evidence before or during the trial.

I would like to mention a few more principles about evidence that I think will help you as we proceed. Some evidence is admitted for a limited purpose only. If I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and no other purpose.

Some of you may have heard the terms direct evidence and circumstantial evidence.

Direct evidence is simply evidence, like the testimony of an eyewitness, which is, if you believe it, directly proves a fact. If a witness testified that he or she saw it raining outside and you believe that witness, that would constitute direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into a courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one and does not say that one is any better evidence than another.

You should consider all of the evidence, both direct and circumstantial, and give the evidence whatever weight you believe it deserves.

Part of your job as jurors while determining the facts is to decide how credible, or believable, each witness is. It is your job, not mine. It is up to you to decide if a witness's testimony is believable and how much weight you think it deserves. You are free to believe everything that a witness says or only part of it or none of it at all. But you should act reasonably and carefully in weighing and making your decisions.

Let me suggest some things for you to consider in evaluating the testimony of each witness.

Ask yourself if the witness was able to see or hear the events in a clear manner. Sometimes even an honest witness may not have been able to see or hear what was happening and may make a mistake. Ask yourselves how good the witness's memory seems to be. Does the witness seem able to remember accurately what happened?

Ask yourselves if there is anything else that may have interfered with the witness's ability to perceive or remember events. Ask yourselves about how the witness acts while testifying. Does the witness appear honest? Does the witness appear evasive? Ask yourself if the witness has any relationship to the government or to the defendants or any

defendant or anything to gain or to lose from the case that might influence the witness's testimony. Ask yourself if the witness has any bias or prejudice or reason for testifying that might cause the witness to slant testimony in favor of one side or the other. Ask yourselves whether the witness testified inconsistently while on the witness stand or if the witness said or did something at any other time that is inconsistent with what the witness said while testifying.

If you believe that the witness is inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may, sometimes it may not. Consider whether the inconsistency is about something important or some unimportant detail. Ask yourself if it seems like an innocent mistake or if it seems deliberate, and ask yourself how believable the witness's testimony is in light of the all of the evidence in the case.

Is the testimony supported or contradicted by evidence that you do find believable? If you believe that a witness's testimony is contradicted by other evidence, remember that people sometimes forget things and that even two honest people who witness the same event may not describe it exactly the same way.

These are only some of the things that you may consider in deciding how believable each witness is. You may also consider other things that you think shed some light on

the witness's credibility.

Use your own common sense and your everyday experience in dealing with other people, and then decide what testimony you believe and how much weight you think it deserves.

Now, no statement or ruling or remark or comment that I may make during the course of the trial is intended to indicate my opinion as to how you should decide the case or to influence you in any way in your determination of the facts.

At times, I may ask questions of a witness. If I do, it will be to clarify a matter and should not be viewed in any way to indicate my opinion about the facts or to indicate the weight I feel you should give to the testimony of the witness.

Remember that you as jurors are at liberty to disregard all comments of the Court in connection with any factual matter in your determinations of the facts.

Also, I may at times take notes. Keep in mind that whether or not I have taken notes at any particular time should not affect you or lead you to think that one piece of information is more noteworthy than any other.

During the trial it may be necessary for me to confer with the parties from time to time outside of the hearing of the jury on questions of law or procedure that require consideration by the court alone.

On some occasions you may be excused from the courtroom as a convenience to you while I discuss these matters

with the lawyers. These occasions will be kept to a minimum.

I will meet with the lawyers in the mornings before we get started and in the afternoon after you have been sent home in order to avoid to the extent possible interruptions when you are here, but you should remember at all times the importance of the matter that you are here to consider, and please remember to remain patient.

The parties may sometimes present objections to some testimony or other evidence. You should not be prejudiced in any way against a lawyer or a party who makes objections.

At times I may sustain the objections and you may hear no answer to a question; or, where an answer has been made, I may instruct you that the answer is to be stricken or removed from the record, and I may direct you to disregard certain testimony or evidence. You must not consider any evidence to which an objection has been sustained or any evidence which I have instructed you to disregard.

The law requires that your decision be made solely upon the evidence before you. The testimony or evidence that I exclude from your consideration will be excluded because it is not legally admissible.

In reaching your decision you must not draw any inference or conclusion from any unanswered question, and you must not consider any testimony which has been stricken from the record.

I remind you if I sustain an objection, it means that I have found the objection to be legally correct and the information to which it pertains should not be considered by you.

If I overrule an objection, it means that I have found the objection to be incorrect as a matter of law and so the information to which the objection pertains may be considered by you as you determine the facts.

As you know, this is a criminal case. There are three basic rules about a criminal case that you should keep in mind:

First, the defendant is presumed innocent until proven guilty. The indictment against the defendant or any defendant here is brought by the government and it is only an accusation, nothing more. It is not proof of guilt or anything else. The defendants, therefore, start out with a clean slate.

Second, the burden of proof is on the government throughout the case. A defendant in a criminal case has no burden to prove his or her innocence or to present any evidence or to testify. Since defendants have a right to remain silent, the law prohibits you from arriving at your verdict by considering that a defendant may not have testified.

Third, the government must prove the defendant's guilt with respect to the charges in the indictment beyond a reasonable doubt.

I will give you further instructions on this point

later, but bear in mind that in this respect a criminal case is different from a civil case. As I mentioned, at the end of the trial I will give you instructions on the law, and those instructions will control your deliberations and decision.

But in order to help you follow the evidence, I will now give you a brief summary of the offense or offenses that the government must prove beyond a reasonable doubt to make its case with respect to the charges.

After you have heard and seen all of the evidence in this case, I will ask you to deliberate carefully according to my instructions and ultimately render a decision regarding the defendants' guilt or innocence. Ultimately, your verdict of guilty or not guilty for any defendant will have to be based solely upon the evidence about the particular defendant.

Now, I will just summarize the charges as I basically repeat the summary that I gave you earlier, but it is important for you to have this brief version. You will have a copy of the full indictment to take into the jury room, so you need not at this point be concerned about remembering all of these particular details.

The indictment in this case contains 33 counts. It will take too long to go through each of them at this point. I will simply summarize for you the concise version that I gave you at the beginning of the process.

There are six types of charges contained in these 33

counts of the indictment.

First, that the defendants knowingly and willfully engaged in a conspiracy or illegal agreement to commit three types of fraud: Mail fraud, wire fraud, and health care fraud;

Second, that the defendants knowingly and willfully engaged in the conspiracy to defraud the United States, namely, the United States Railroad Retirement Board, or RRB;

Third, that all of the defendants committed health care fraud;

Fourth, that all of the defendants committed mail fraud;

Fifth, that all of the defendants committed wire fraud; and,

Sixth, that one of the defendants, Mr. Rutigliano, made a false statement to an agency of the United States, namely, the RRB.

Again, in sum, all of the charges relate to allegations that the defendants fraudulently obtained or helped others, specifically, the Long Island Rail Road employees, to fraudulently obtain benefits from the federal government that they were not entitled to receive.

Once again, it is the government's burden to prove every element of each of the offenses that I have just described beyond a reasonable doubt, and I will give you specific instructions and descriptions about what those

elements of each of the crimes are during the full instructions on the law.

Now, a few words about your conduct as jurors. As I have explained, your role is to consider all of the evidence properly before you in order to decide the facts. You must endeavor not to decide any issue or form any opinion in the case until you have heard all of the evidence and have been instructed in the law and then retire to the jury room to deliberate.

Until the case is submitted to you, which means at the end of the trial, you are not to discuss the case with anyone, not even your fellow jurors. It would be improper for you to allow anyone to discuss the case in your presence or influence you in any manner.

In addition, you must not talk to the parties or witnesses or anyone else related to the case under any circumstances. Sometimes jurors have difficulty understanding why it is that they are not allowed to discuss the case with each other. We ask that you not discuss the case because we want you to keep an open mind until you have heard all of the evidence and my instructions regarding the law. Therefore, we ask that you avoid discussing the case until you are ready for deliberations. It is very important that you strictly observe the rules that govern you during the recess, during the breaks in the trial, during lunch, and at the end of the day after you

are discharged for the day so as to assure the parties a fair trial by not allowing any form of outside information or incidents or influence to sway you in your consideration of the case in any manner.

So, let me summarize again. As I mentioned, do not discuss the case either among yourselves or with anyone else during the course of the trial. Do not permit anyone to discuss the case with you or in your presence. I realize this may be difficult because it includes family members, spouses, close friends, and close associates, but it is the only way for the parties to be assured of the absolute impartiality that they are entitled to expect from you as jurors. Until you retire to deliberate in the jury room, you are simply not to talk about the case with anyone.

Second, attorneys and parties in the case, as in any case, are instructed by the Court not to have any contact or to communicate with you in any way. If you should happen to see attorneys or assistants or others involved in the case in the hall or anywhere during the trial and they do not greet you or exchange pleasantries, please understand that they are not being rude. They are simply following the instructions of the Court that we give in every case.

Thirdly, it is important that you not read any form of newspaper articles, listen to radio or television broadcasts about the case, if there are any. Media accounts may be

inaccurate and may contain information which is not proper evidence for your consideration. If there are any media reports, simply avoid reading or watching them.

Fourth, do not do any form of research or make any investigation about the case on your own. This includes by any form of technology means, Internet, websites, social media or any such form of communication.

Fifth, if anyone should try to talk to you about the case, you must bring that to my attention immediately. Do not discuss it with your fellow jurors. Should you inadvertently read or see or hear anything concerning the case, you should immediately inform me.

Finally, do not attempt to form an opinion of any kind until after all of the evidence has been presented. In fairness to the parties to the lawsuit, you should keep an open mind throughout the trial and reach your conclusion only during the deliberations after all of the evidence is in and you have heard the attorneys' closing arguments and my instructions on the law. Then, after an interchange of views with the other members of the jury, in that way each party's evidence will receive equal consideration from you.

If you want to take notes during the course of the trial, you may do so. However, it is difficult to take detailed notes and pay attention to what the witnesses are saying at the same time. If you do take notes, be sure that

your note-taking does not interfere with your listening and considering all of the evidence.

Also, if you take notes, do not discuss your notes with anyone before you begin your deliberations. Keep in mind that you will not be allowed to take any of your notes with you at the break or at the end of the day or at the end of the trial. We will give you notepads that you can use for taking notes, and these should be left on your chairs in the courtroom during breaks at the end of the day and at lunch.

Whether or not you choose to take notes, remember that it is your own individual responsibility to listen carefully to the evidence. You cannot give this responsibility to someone else who is taking notes. Notes should be used only to refresh the recollection of a juror who took the notes.

You should not use any notes in jury deliberations to prove to other jurors that your notes are in fact what witnesses said. Your notes reflect only your impression of what witnesses said, and we depend on the judgment of all members of the jury, who are all responsible for remembering the evidence in the case.

Remember that notes are only aids to memory and should not be given precedence over your own independent recollection of the facts. You must not allow note-taking to distract your attention from the proceedings.

You will notice that we have a court reporter making

an official court transcript or a record of the trial. Although you will not have a typewritten transcript of the trial made available to you for use during your deliberations, if you have questions about any portion or excerpt of the testimony, it may be possible to have an excerpt read back to you. Again, I will give you more instructions on that in the final instructions.

Now, let me go over the order of proceedings.

The trial will go as follows:

The government will first make an opening statement, which is simply an outline to give you a frame of reference and help you understand the evidence as the government presents it and as it comes in.

Next, the defendants' attorneys may, but they do not have to, make opening statements. What is said in the opening statements is not evidence.

The government will then present its witnesses and counsel for the defendant or defendants may cross-examine them.

At the end of the government's case, the defendants may, if they wish, present witnesses whom the government may cross-examine.

After all the evidence is in, the attorneys may present their closing arguments to summarize and interpret the evidence that has been presented as they perceive it. What is said in the closing arguments is not evidence, just as what is

said in the opening statements is not evidence. The closing arguments are designed to present to you what the parties believe the evidence has shown and what reasonable inferences they believe may be drawn from the evidence.

After you have heard the closing arguments, I will instruct you on the applicable law, and you will then be asked to retire to the jury room to begin your deliberations on a verdict.

Keep in mind that during your deliberations you will be permitted to see all of the exhibits that have been admitted into evidence at the trial or to have witness testimony read back to you if you so request.

So, with those instructions, I will then adjourn at this point and ask that you return tomorrow at 9 o'clock promptly.

Bear in mind all of the difficulties that you may encounter in transportation, and even, as I indicated yesterday, in getting into this building. Sometimes lines form downstairs, and it may take five, sometimes as much as ten minutes to go through lines. So you should make allowance for all of those prospects in determining what time you should leave home in order to be here promptly and ready to start by 9 o'clock a.m.

Thank you. Have a good evening. We will see you tomorrow. The clerk will escort you into the jury room and

give you instructions about what you should do.

(Jury not present)

THE COURT: All right. Thank you.

It is my practice to go over the order of the day or days, give the parties some indication of what to expect. We had talked about the opening statements. We had indicated 25 minutes for the government, 25 for each of the defendants.

Now, let me pose a question to the defense team. To some extent there is likely to be some amount of overlapping or duplication in your presentation.

I wonder whether each of you will actually need the full 25 minutes to present your opening statement. If you do not, if you feel that there may be some level of overlapping in what you are going to be saying, it would be helpful if you could streamline it so that we can save some time that way.

That said, would the government indicate its order of the witnesses, the batting order and who is on deck?

MR. WEDDLE: Yes, your Honor.

Our first witness is Steven Gagliano. He is a cooperating witness. I think his direct testimony will take at least two hours.

Our second witness is Gary Supper, also a cooperating witness. His direct testimony may be slightly shorter than Mr. Gagliano's.

THE COURT: How much slightly?

MR. WEDDLE: Probably right around two hours. I think Gagliano is probably between two and three.

THE COURT: All right. Is that it?

MR. WEDDLE: Those are our first two. I think that will probably take us through tomorrow, because I'm anticipating cross-examination for cross-examination for each of them. We have about more than an hour and a half I would say for openings, and then Mr. Gagliano will probably take us through lunch and then cross-examination, and then Mr. Supper I would imagine that the cross of Supper would go into the next day.

There are a couple of issues with respect to Mr. Supper that I wanted to raise.

THE COURT: Let me raise an issue. It may not be something that you need to address at this point, but at some point during the course of the trial. If it becomes necessary, depending upon how the time goes, I may resort to taking an estimate of the time that we have allotted and dividing whatever remaining time there is at that point between the two sides so that we can make sure that we stay within the bounds of what we've told the jury.

Yes, Mr. Weddle?

MR. WEDDLE: We still need to get stipulations on certain matters, your Honor. So, to the extent that your Honor is going to divide the time allotted and limit the government

to half of that time and the defense to half of that time, there may be an unfairness there or some strategy that could be played by the defense to refuse to stipulate and cause the government to use up portions of its time with meaningless uncontested testimony by custodial witnesses.

I don't anticipate that that is going to happen, but we've gotten three stipulations out of probably 15 or so that -- four stipulations out of a large number that we've proposed.

I'm still optimistic that we are going to get more stipulations. I don't think that the defense wants a forced march through a series of custodial witnesses and certainly the government doesn't want to have that type of thing happen. But until we have them, we don't have them.

We do have a couple of stipulations that I plan to use during the testimony of Mr. Gagliano, so we've made progress at least that far. We have been told with respect to some of our proposed stipulations that the defense is confident that they don't want to stipulate.

I think that I mentioned this in the morning on the first day of trial, but it was on my list, I may have forgotten to mention it, but I have been told that we need to add a witness to authenticate the video and the still photograph of Mr. Rutigliano playing golf that was taken by the New York Times.

And I have been told that we need to add a witness to authenticate filed tax returns that were filed by Mr. Rutigliano and Ms. Baran.

Those aren't long witnesses, your Honor, but it's two additional witnesses that we had hoped to have stipulations on, because I think that the facts surrounding that authentication are probably not going to be highly contested.

But be that as it may, the defense obviously has a complete right to refuse to stipulate if they would like. But I don't want the government to be prejudiced in terms of simple timing matters by creating any kind of opportunities for strategic action by the defense.

THE COURT: All right.

MR. DURKIN: Judge, could I speak to that?

THE COURT: On that point, let me just give you my general approach and impressions of these.

This is not aimed at any particular defendant or this particular case. In general, I do not take kindly to situations where parties engage in hypertechnicalities, the end result of which is to inconvenience everybody.

To the extent that there are facts that are facts and there is no good-faith basis for challenging the authenticity of a document, of course, the parties have the right to insist on compliance with the rules, and it is something that the Court can do if you insist on complying with the rules, but

bear in mind that the net result of this kind of what I call hypertechnicality is that we delay the trial, inconvenience the jurors, inconvenience the other side, for no good purpose.

If there is a document that on its face there is no good-faith basis for challenges, that that is a document and that it says what it purports to say, it just doesn't make any sense to insist that you bring a witness here, also inconvenienced, in order to, say, yes this is a true copy of the document.

That is the general approach to these things, and I will also ask about whether the parties have agreed to the documents that are going to be introduced as exhibits as to which there is no disagreement so that we can introduce those and accept them into evidence in bulk. We can come to that point in a moment.

Mr. Durkin?

MR. DURKIN: Judge, I am a little concerned about Mr. Weddle's statement.

The only thing that we have said that we would not stipulate to is the New York Times issue, and we have a good-faith basis for doing that. It is not going to be very time consuming.

We had told the government that we have absolutely no desire to delay this trial. We are not getting paid by the hour. We have no motive to be here. I don't even live here.

So there is no suggestion whatsoever that -- I have thought so far we have been getting along pretty well on this, and I expect we are going to be able to stipulate to all the kinds of things you just talked about.

So I just want to make that clear. We have no reason whatsoever to delay this trial. We don't want to delay the trial.

But what I did want to speak to, and I will just say this now, and my mentor Frank Oliver, who is long since dead, will be happy that I said it, but he always used to remind me to remind judges that the only people in the courtroom that have rights are the defendants.

The government has powers and authorities which they can exercise. But for the government to claim that somehow they are going to be prejudiced, I disagree with. We are working with them. I don't see a problem with stipulations. We've gotten along very well as far as I can tell, and I resent even the suggestion that somehow we would want to play games with timing for tactical reasons.

THE COURT: Well, I take in this circumstance, Mr. Durkin, the word prejudice in its widest possible application.

MR. DURKIN: I appreciate that.

THE COURT: To the extent that the government and you will have to be working over the Labor Day weekend instead of

being at home in Chicago or wherever, that is a form of prejudice in my mind.

So it's important that we find ways of avoiding those means of prejudice in its largest sense, inconvenience and the possible effects.

MR. DURKIN: I will venture to say, Judge, there is no one in this courtroom that wants this trial to end more than I do. Trust me, we will do everything possible to expedite the trial.

One thing that would greatly expedite the trial, however, is if we can at least have the witness order in a given week. Because after Supper we don't know who is coming. That could cause some delay because Mr. Dratel and I, for example, have to split up the cross-examinations. We need to speak to cocounsel. To the extent we can -- at least in Chicago it's fairly common that the government, particularly in a lengthy trial that the government has to give notice of upcoming week's witnesses.

THE COURT: Mr. Durkin, you heard me say to the government that I wanted to hear who is the starting team and who is on deck. I heard the starting team of Mr. Gagliano and Mr. Supper.

So, Mr. Weddle, who is on deck?

MR. WEDDLE: Your Honor, before I answer your Honor's question, if I may, I wanted to make clear and I hope that I

made clear that I think we are working well with defense counsel, and I am optimistic that we are going to reach stipulations that we have proposed.

We are working with them. We haven't had a problem. I was just saying that we haven't had complete success yet either. So if we are at this early stage of the game talking about dividing up a six-week period and saying the government you get this much, the defense you get that much, that works to our detriment.

I am not saying that we are going to come to that. I just wanted to make that simple point, that that type of effort in order to keep the trial within the time frame that we have been talking about works to the detriment of the government.

I don't think it's going to come to that. I think that we are going to reach agreement on these things. As I have said, we have been working well, and I echo what Mr. Durkin has said.

But as a prosecutor, I know that anything that can go wrong can go wrong. So until I have a signature on a stipulation, I need to continue to think about how am I going deal with it if at the end of the day they say, you know what, we are not going to do it.

So I tend to be anxious about that kind of thing, your Honor, until I have a fully signed stipulation. I don't have that except with respect to a couple of the very most basic

authentication stipulations that we have proposed. It is just a little anxiety that I have, your Honor, that I just wanted to share with the room, and it is not to say that I am not optimistic. I am optimistic.

THE COURT: All right. To remain with the baseball metaphor, it ain't over till it's over.

MR. WEDDLE: Exactly, your Honor.

THE COURT: Mr. Ryan.

MR. DRATEL: Your Honor, can we ask this question about witnesses first?

THE COURT: Yes.

MR. DRATEL: Because that's the one question that is on the table.

THE COURT: Anything else? Mr. Ryan has stood up. Mr. Ryan, were you addressing this issue?

MR. DRATEL: Your Honor, you asked about the witnesses after Mr. Supper. Let's get that out of the way first before we get distracted. I would like to hear that because we've been trying to get this answer to get some kind of lead time.

MR. WEDDLE: Your Honor, when the defense has asked me for this answer I don't like the dynamic of always being in the position of giving everything for the government and getting nothing in return. So when the defense asks me for what I need more than just the first two witnesses so that I can prepare, I say a number of things to the defense.

I say, number one, you have had the 3500 material for weeks.

Number two, you have had the marked exhibits for weeks.

Number three, I have told you the first two witnesses.

Number four, I'm waiting for stipulations.

So why don't you start giving me a stipulation or a couple stipulations every morning, and I will give you a name. That is sort of the posture that we are in here. Obviously, if your Honor is ordering me to simply give up the list of names, then they are in a position where they don't need anything from me and all I need is stuff from them, which are stipulations.

This is the type of thing that I would rather not involve your Honor in. It's a small-scale, you know, small-game jockeying among counsel at the beginning of a trial. It's going to work itself out. I'm confident.

I have been through this many times before. This is the kind of thing that happens at the start of the trial. It stops happening very quickly. So I think that's where we are going to be. I don't think we have to burden your Honor with this kind of thing.

They have had these two witnesses' names since Friday. I am sure that they are fully prepared to cross-examine these witnesses. I think that these witnesses -- perhaps it would be helpful if the defense told me how long their cross-examination

of Mr. Gagliano and Mr. Supper was planned to be. Each defense counsel could tell me that, and then it would be easier for me to make a prediction about whether Mr. Summer and Mr. Gagliano take us through the end of the day on Friday.

THE COURT: All right. Let me make a couple of observations.

MR. DRATEL: Your Honor, may I speak to what he said, because there's inaccuracies in what he said. Number one, we got 50 pieces of 3500 material Monday night, including new witnesses. So that is just not true.

The second thing is, the stipulation issue, it is not a tradeoff that we only get the names of witnesses if we stipulate. That is coercion. That is a totally independent issue.

The question on stipulations is we can only stipulate to things that we agree with, matters of fact. This is not questions of authenticity that we are talking about.

There are questions in some of these stipulations about facts. Some of the facts are in dispute. We are trying to work out language that accommodates both sides without the need to call a witness. We can't have a stipulation that cuts off at one point and is not reciprocal in the sense that it only has one side of the story in it. That is one of our issues with stipulations, and we are confident that we can work that out. But the notion that we only get witness names which

we are entitled to to make this trial work only if we give something up that we don't have to give up as a matter of our obligation to our clients we cannot give up, that is improper to make that exchange. That's what's happening.

THE COURT: All right. Let me make a couple of observations, again because the dynamic that Mr. Weddle describes is one that the Court is also very familiar with at the beginning of many of these trials. There's always this kind of initial tension among counsel. Despite the good working relationship, some residual tension always remains. It works itself out eventually, but it causes a certain amount of unpleasantness, and most of the time it is not necessary.

I agree with the defense that the government should not see some of these things as tit for tat. On the other hand, I have had many cases in which the parties have arguments about stipulations, that the drugs that the defendant was caught with was cocaine and not sugar, and they argue about whether or not they should bring the expert from Washington in order to tell us that the drugs in the envelope were cocaine.

Sometimes the defense puts the government through that kind of runaround. It's common. In cases where this has happened, the reason why the defense does that is because they want something from the government. This is all human nature.

The bottom line in most cases is that it causes unnecessary friction, tension, and it works against the kind of

good working relationships that speed up cases. We do not have the luxury of delays of any kind in this case for the reasons that you all know about.

It is the practice of the Court also to ask the government to give us the names of people a couple of days down the road in the same way that it is the practice of the Court to insist that defendants not exercise hypertechnicalities on matters where there is no good-faith basis for withholding consent.

Of course, you will say that there are issues of fact, but I have given you examples in which there are no issues of fact and it is all technical holding back because one party wants something from the other. I am not saying that that is what is involved here, but I have seen it enough times to see it and to recognize it where it is what it is.

So I will ask the government to give us some indication of what witnesses it expects after Mr. Supper, and I will also ask the defendants to go back and think hard about getting those stipulations in so that it gives the Court and the government comfort that we are not going to be bringing in witnesses here for no good-faith reason.

(Continued on next page)

MR. WEDDLE: After Mr. Supper, your Honor, we plan to call Mr. Parlante, also a cooperating witness. So I'd say his direct testimony is probably around the same as Mr. Supper's.

And it would be helpful, your Honor, to know for our own scheduling purposes some kind of prediction on how long the defense thinks they maybe cross-examining.

THE COURT: That was going to be my next question because that's important, and it is also important for another reason. We have three defendants and each of them has his or her own lawyer. In many cases where we have multiple defendants and multiple attorneys, we lose time unnecessarily because each counsel wants to have an opportunity to cross-examine and we find -- again, this a matter of experience -- that a lot of the cross-examination becomes repetitive, duplicative, and unnecessary.

If you have a witness who is testifying only as to matters pertaining to one defendant and not to another, there is no reason why the other defense counsel, unless something extraordinarily compelling, should feel that they have some cause to want to cross-examine every single witness on every single issue. If during the course of the cross-examination by one defense counsel, the key points that pertain to the case have already been brought out, it makes no sense to have the cumulative cross-examination by other defense counsel bringing out the same points all over again.

We have instances in which -- and you will see this happening during the course of the day -- where witnesses come forward and give their pedigree. One witness will give the pedigree. For whatever reason, this happens usually with expert witnesses under cross-examination by one defense counsel. The next defense counsel will come up and ask the witness again some pedigree questions. Totally unnecessary.

If the witness has already said that he or she graduated from such and such university, here the jury doesn't need to hear that three times, unless there is some question of fact as to whether or not the witness graduated from wherever it was. Just an example.

So I would ask the defense to see to what extent you can coordinate and streamline cross-examinations, assign witnesses to one person so that you don't all three need to cross-examine every single witness, and you can take the lead on different witnesses, depending upon what that witness is testifying to, and that way we can also make a lot of time.

Now, coming back to exhibits.

In the Court's individual practices, I ask the parties to do everything possible to identify documents that are intended to be introduced into evidence and admitted as to which there is no objection. And then I ask that that list of those exhibits numbered be read into the record before the witness testifies so that during the course of the direct or

cross-examination the party who is doing the examination, direct or cross, could simply bring in the document that has already been preadmitted. You don't have to stop with every single witness to introduce a document. We lose an enormous amount of time trying do it that way.

So if you have exhibits as to which there is no good faith objection, identify those in advance. We will read those into the record before the witness testifies, and then the examination, direct and cross, could go much more smoothly.

If there is a good faith objection to a particular document, put those aside or flag them. And when those are introduced in the order in which they come in, we can then have whatever arguments there may be about whether or not they should come in.

All right. Now, Mr. Ryan, I know that you were --

MR. RYAN: Your Honor just said what I was about to say.

THE COURT: Thank you for anticipating the Court.

MR. RYAN: The idea of exhibits and marking them, that's got to be resolved before the witness testifies. For example, we are going to have Mr. Gagliano tomorrow. We should agree what exhibits they are going to offer and what exhibits we may have so that we can eliminate that. That is the most productive process. So that we are not talking in the abstract now. We are talking about Mr. Gagliano. We are talking about

Mr. Supper.

The government tells us what exhibits they want to use for that examination tonight, and we will point out what exhibits we have. And we have premarked -- I have given the government our defense exhibits, and I've even given them written objections. And I think if we do this witness-by-witness and day-by-day, we iron out what exhibits we want we don't have to go through these abstract arguments. I think that is a great suggestion, Judge. Thank you.

THE COURT: Thank you. So the parties should -- if you have not done so already, and I would be disappointed if you have not, go through this exercise of identifying the documents that are going to be used for the witnesses who are coming up and marking those as to which there are no objections and then making a list of those so that we can preadmit them.

All right?

MR. RYAN: Thank you.

THE COURT: Anything else?

Mr. Weddle.

MR. WEDDLE: Sorry, your Honor, to belabor this issue, but it would be very helpful in terms of scheduling witnesses if we had a prediction about how long the cross-examination would be.

THE COURT: I was going to come to that. That is the reason I made the statement that I did about cross-examination

so that we don't duplicate unnecessarily a cross-examination of witnesses and that counsel coordinate their presentation so that if it is not necessary that each cross-examine, that you designate whoever it is that is going to do it per witness and you share the burden that way.

Mr. Durkin.

MR. DURKIN: Judge, while I think Mr. Gagliano may affect both -- I will cross-examine Mr. Gagliano first tomorrow. I would like to think I could do it within two hours. I hope so. I don't want it to be any longer than that, although sometimes I am told by other judges that my estimates are poor.

But there is an issue -- Mr. Weddle and I have discussed this. There is an issue that I think may help here. We have done a stipulation with respect to I believe it's Government Exhibit 101.

Am I correct, Mr. Weddle?

MR. WEDDLE: Yes.

MR. DURKIN: 101 is the entire RRB file for Mr. Gagliano. As I understand it, the government is going to -- the stipulation authenticates Exhibit 101, that this is a true and accurate copy, so we don't have any problem with that. However, I don't believe the government is going to admit 101, which might get into some timing issues, because there are documents within -- the government, in addition to Exhibit

101 -- do you have a copy of their exhibit list, Judge? There are a number of -- I just sent mine back with the clerk because he has to go to class tonight. But there is a number of 101 subexhibits, 101-A through I want to say G, Mr. Weddle.

THE COURT: I have through S, 101S.

MR. DURKIN: 101S.

MR. WEDDLE: I think we can do this a little bit abstractly. I think in refining my Q and A for Mr. Gagliano, I have cut some of the exhibits, but there are some, a few documents that come from that file that are submarked as exhibits that we are planning to offer. I don't have a problem with going through with defense counsel and saying these are the exhibits that I am planning to offer through Mr. Gagliano and doing as your Honor suggested and as Mr. Ryan suggested. But there is probably a shorter list than what is on the exhibit list right now.

MR. DURKIN: That is fine.

MR. WEDDLE: In general terms --

MR. DURKIN: Here is my point. There are other documents in that file, and this kind of goes to the length of the cross. I expect that Mr. Gagliano will admit to those. I don't think I am going to have to offer them. I may use them to cross-examine.

There are quite a few medical records, for example, contained in Mr. Gagliano's medical records contained in 101.

I am assuming he will -- I may need to use some of them to refresh his recollection, and I'm assuming he is going to admit to the things that are in there. So I don't know that it will be necessary for us to admit it.

But that's -- it would be easier if 101 could just come in, I think, from a timing standpoint. But I think the government has issues with some of what 101 is coming in.

THE COURT: Mr. Weddle.

MR. WEDDLE: Your Honor, the stipulation is a stipulation. So the file is authenticated. The file as a whole should not be admitted. It has a number of different kinds of documents in it. If, in fact, if we are talking about Mr. Gagliano's file, it includes documents relating to a continuing disability review which we made a motion in limine on which your Honor granted. And I have a little bit more to say about continuing disability reviews which I would like to come back to later. So that's just one example of why that entire file should not be in evidence. So we plan to offer some pieces of it.

What Mr. Durkin describes as using documents to refresh recollection or to cross-examine a witness, if the witness makes an inconsistent statement and there is a prior inconsistent statement reflected in a document that's in that file, then that seems like fair cross-examination. That doesn't involving offering the document, because, after all,

you can refresh recollection with anything, or attempt to refresh recollection with anything.

So to the extent Mr. Durkin is pulling items from the file and cross-examining in those fashions, your Honor, it seems fine. It also seems not to matter that they come from the file.

But to the extent he wants to offer the document, then we are going to have to have a discussion with him about what would be the basis for offering the document, and I think what he's described so far doesn't involve offering the document.

THE COURT: All right.

MR. DURKIN: What I'm getting at, Judge, to be clear is that there are documents, for example, that may well be part of this continuing review. I understand your order to say that we can't make reference to the continuing review, but I don't see that as precluding me -- you know, for example, if there is a medical record that he submitted as part of that, it seems to me I should still be able to use that document to cross-examine him as long as I don't say "and this is all part of a continuing review." Do you understand my point?

THE COURT: If you are using the document for a purpose that doesn't require the introduction of it, you are using it for credibility or impeachment or for refreshing recollection that does not require an identification of the document, those are all, as I view it, legitimate purposes of

cross-examination of these documents.

MR. WEDDLE: Your Honor --

MR. DURKIN: I just wanted to make sure, I just thought, since it is going to come up tomorrow.

MR. WEDDLE: Your Honor, I just think this is incorrect, your Honor, and this is the thing I wanted to come back to on continuing disability reviews. In fact, we are in the process today of preparing a letter to your Honor because we received an e-mail last night from Mr. Jackson in which Mr. Jackson said that he fully intended to offer evidence relating to continuing disability reviews for an additional purpose that he claimed was not covered by our motion.

So last night, late at night, I was spending time pulling quotes from our motion that demonstrated that what he was arguing was exactly covered by our motion. Our motion moved to preclude any reference to the continuing disability reviews both on relevance grounds and on 403 grounds. And the problem is --

THE COURT: We are not talking about something else, Mr. Weddle; we are talking about impeachment or refreshing recollection that does not implicate having to indicate what the nature of this document is or getting into a contest over the source or the meaning or the definition of the document.

MR. WEDDLE: Well, your Honor, that's highly problematic because -- and this is exactly what we argued in

our motion -- which is if they're pulling out a statement relating to a continuing disability review process and they're saying isn't it the case that you told somebody in 2010 X and the witness says whatever the witness says in response to that, we are now left hanging with another interaction with this witness.

If the witness says, yeah, I remember saying that, now the jury is left wondering, well, what was that interaction in 2010? Where did that come from? And what's the explanation? And the problem is the explanation is going to add a tremendous amount of time, and it's going to cause confusion -- well, leaving it hanging causes confusion and threatens to mislead the jury. And in order to undo that confusion the government would then have to prove up the whole continuing disability review process, disprove these incorrect characterizations that the defense -- that Dr. Ajemian, Dr. Lesniewski in his opposition to the motion that we made, and Mr. Jackson in his attempt to reargue the motion on Monday morning, and Mr. Jackson in his e-mail to the government last night have all mischaracterized these reviews.

And so we move to preclude any reference to the reviews. And to cross-examine a witness based on interactions relating to that review, documents relating to that review, things that a doctor may have written as part of the review, things that the RRB may have written in conjunction with those

reviews, things that the witness may have said or written in conjunction with those reviews causes all of the prejudice that we moved in limine to preclude, and your Honor granted it.

And the reason that we made the motion in limine was because we knew this would be an issue, and we thought that in limine motions are designed to permit these issues to be resolved in an orderly fashion. We made the motion. It was opposed by Dr. Lesniewski. I can't remember now if Marie Baran joined in their opposition, but, in any event, she did not submit her own arguments on this. They tried to reargue it on Monday morning at the start of the trial. They were sending us e-mails last night trying to reargue it. The same argument was made by Dr. Ajemian in conjunction with his sentencing. The government responded to it then. We made similar responses in our motion in limine and in our reply papers, and the Court granted the motion.

THE COURT: All right. Mr. Weddle, I think, again, we are belaboring the point. We will examine exactly the scope of what was ruled, and if the defense come forward with something that is not within the scope of what was ruled, the most we could do is listen to see what form of creative mind they have to think of something that hasn't been already said and argued many, many times, but let's not prejudge their creativity.

MR. WEDDLE: Well, your Honor, it is highly problematic for the government. We made this motion on time.

It was decided on time. We are planning to call Steven Gagliano tomorrow. He was subjected to a continuing disability review.

We are entitled to know -- we did know that any reference to the documents relating to the continuing disability review were precluded. This is from our brief. We move to preclude any suggestion or argument about the reviews, any finding made or exam performed in connection with the reviews. And so we prepared -- I've prepared the questioning of Mr. Gagliano accordingly.

Now, if I need to go back and add into the questioning his interactions with people relating to the continuing disability reviews, that undoes the ruling. So he --

THE COURT: Mr. Weddle, let me interrupt for a moment.

Cross-examination has to be within the scope of the direct.

MR. WEDDLE: Your Honor, the problem is that one of the many reasons that we moved to preclude this evidence is because the continuing disability reviews relied, of course, on the false statements made by these three defendants as well as false statements by their co-conspirators, like Mr. Gagliano. And so as the government we don't want to be in a position of not eliciting a false statement made by Mr. Gagliano if it's going to be the subject of cross-examination. That's exactly what why we made motions in limine, so we know that that

evidence is precluded, it will not be part of cross-examination so that we're not unfairly whipsawed in cross-examination by not eliciting the fact that when he went for the continuing disability review he was afraid, obviously, that he might lose his benefits and so he lied about what his condition was like. And that played an important part, obviously, in the result that came out of that continuing disability review, which is that he continued to have his benefits.

There is more to that story, but we shouldn't be whipsawed by making a motion that precludes the evidence, leaving it out of our direct examination, and then having the defense, having lost the motion, having made all these arguments, that were fully considered by the Court and denied, then pulling out documents and saying that they are only using them to refresh recollection or to, you know, whatever they are using them on cross-examination for credibility purposes.

There is a credibility issue with respect to the continuing disability review because Mr. Gagliano lied. He did not tell the truth when he went to that exam. These defendants lied, which played into the continuing disability review, and that information was precluded by the Court as irrelevant and prejudicial under Rule 403.

And if that ruling means anything, it means we can safely leave it out of the direct without being whipsawed on cross-examination.

THE COURT: All right. Now, again, let me come back.

When Mr. Durkin was talking about -- or made reference to documents that he may want to use either for refreshing recollection or impeachment purposes, I understood what he was saying in its generic term, in its generic use.

If the document has already been precluded by a prior ruling of the Court, then it is precluded. So we'll just have to cross that bridge when we come to it, Mr. Weddle and Mr. Durkin.

MR. DURKIN: Judge, I've read your ruling quite carefully, and I intend to stay within the limits of your ruling.

THE COURT: All right.

MR. WEDDLE: Your Honor, I think that this -- I mean, crossing that bridge when we come to it causes extreme prejudice to the government for the reasons that I just explained. If this evidence is going to be use on cross-examination, I need to elicit it from my cooperating witness.

THE COURT: Mr. Weddle, listen carefully to what I said. If the evidence has been precluded by the Court's previous ruling, it is precluded.

MR. WEDDLE: I agree, your Honor, and Mr. Durkin has said he --

THE COURT: Let me just give you an example about

refreshing recollection.

If the witness testifies to something where we are sort of -- this is all speculative because we don't know what Mr. Gagliano is going to be testifying to about which he won't have present recollection. But if it comes to a point where he doesn't remember something and there is a document that might refresh his recollection, without identifying what that document is, it may be possible that he could be shown the document, that it could refresh his recollection, without getting into the question of where the document comes from, what it is, or the kinds of concerns that you have.

MR. WEDDLE: That's true, your Honor, in the abstract.

I think that what would be useful --

THE COURT: The whole conversation is in the abstract.

MR. WEDDLE: Exactly, your Honor. And what I was going to suggest is that since everybody knows that Steven Gagliano is the first witness, that Mr. Durkin simply tells me which documents he is planning to use. Then we can look at them, and I can see whether I think that they are within your Honor's ruling as being excluded.

He says he's read your Honor's ruling and he doesn't intend to violate it. Mr. Jackson has said that he understands your Honor's ruling and he doesn't intend to violate it. But based on his arguments on Monday and his e-mail to the government last night, he clearly doesn't understand your

Honor's ruling in the way that we do. So this apparently is an issue that maybe has to be rehashed. We thought that it was an issue that we could just make an in limine motion and things would be clear, but, unfortunately, we are in a position -- and I don't think that this is a big deal, your Honor. I think that rather than speaking abstractly, defense counsel could just say here's the document that I want to cross-examine him about, here's what I want to get from him. If he doesn't give me this, then I'm going to use this document to refresh his recollection.

The problem is going to be if what he's trying to get from the witness has been excluded by the Court, then --

THE COURT: If it has been excluded by the Court and they make an attempt to get it through the back door, the Court will close the back door.

MR. DURKIN: Judge, if I could just say one thing?

I don't anticipate, if this witness tells the truth, of having to use any documents, because I anticipate he will answer my questions "yes" when I ask him about the things I'm talking about, because I don't know how he can dispute it. This is a man who is going to come on and say I really wasn't disabled when I filed this disability. There are a number of things -- and I don't really like to have to pre-try it now -- that I intend to ask him about with respect to those injuries that he testifies he's now saying they're false. I believe, if

he tells the truth, I won't need to use any documents because he will have to say "yes" to the answer. I only anticipate a problem if he says I don't know what you're talking about, or, no, I never said that; then it is a different issue.

But, I mean, you know, Mr. Weddle knows the document and everything is right in the document, either -- you know, and I don't see anything in your order that said we were precluded from using exhibits. Your order says "reference."

Now, I grant you that I can't stand there and say didn't you say in the review on such and such a date. I don't intend to do that. That would be violating your order. I think you understand where I'm coming from, and at least I understood what you were saying. That's all I am going to try and do.

THE COURT: All right.

MR. JACKSON: Judge, can I say one word before Mr. Weddle goes again?

MR. WEDDLE: Your Honor --

THE COURT: Mr. Jackson stood up and has the floor.

MR. JACKSON: Thank you very much, Judge. I greatly appreciate that.

The first thing I want to address, I'll start here, is that with respect to the whole timing issue and the opening statement issue, let me go to that.

THE COURT: Excuse me, Mr. Jackson, for a moment.

MR. JACKSON: Yes.

(Pause)

THE COURT: Yes, Mr. Jackson.

MR. JACKSON: Thank you, Judge. I fully intend to use the 25 minutes. I suspect the Court will at some point stop me and have me exit stage left. I understand the need for coordination, but I also understand the need for everyone to understand that every defendant here retained their own lawyer, and I don't think ceding representation would be appropriate for any particular defendant.

On that line and in that vein, if a witness -- I don't intend to be duplicative. I don't intend, provided that counsel is covering cross-examination -- we are past the opening statement now -- in their cross, I'm not going to redo what Mr. Ryan does or what Mr. Durkin does or what Mr. Dratel does, but I can't give you an estimate on my cross-examination because I don't know what other additional things may be elicited from this witness which affect Ms. Baran. And, obviously, Ms. Baran has a right not to have her representation ceded and for me to agree to another lawyer cross-examine upon a point which may be insignificant as it relates to their client but may be very significant as it relates to me.

Having said that, coming back to the continuing disability review issue.

I just received an e-mail from the government -- OK,

this was not two months ago, this was not last year, this is not when the case started and they were initially indicted -- this is an e-mail that I received wherein Monday -- we received the e-mail Monday. So Monday of this week, Judge, I received an e-mail, and the e-mail happens to reference independent medical examinations, opinions and tests, and the results that were obtained to virtually all Long Island Railroad occupational disability applications since August of 2008. The results through September of 2011 have confirmed the impairment claims -- this is the e-mail, which is dated, by the way, October 28, 2011, at 1:59 p.m. Why I'm receiving it Monday, July 15th, of 2013, is beside the point. But I received this e-mail. And then it says, the results through September 2011 have confirmed the impairment claims by the applicants and their treating physicians, with benefits being awarded -- only four more lines, Judge -- to 346 applicants, benefits being denied to 13 applicants, two applicants withdrawing an application.

Continuing disability reviews consisting of independent medical examinations, opinions and tests were also completed for 355 Long Island Railroad employees already drawing occupational disability. The reviews demonstrate that 354 individuals continue to be occupationally disabled, one annuitant being deceased.

Now, clearly, Judge, that was something within the

province of the government, this e-mail, that was something that clearly could have been disclosed at an earlier time that would have been brought to my knowledge, the knowledge of co-counsel, the knowledge of our respective clients, and could have been addressed by the government in a way that was open to everyone, in a way that your Honor's order would have contemplated the issue of this going to the heart of this matter.

The argument of the government, Judge, is that my client lied. She's a fraud. And she's a fraud because everyone came to her telling her they weren't disabled but you help me in my disability and we'll get it.

Well, this, Judge, establishes that after independent medical evaluations and reviews, guess what? There are no liars because that was confirmed.

To be clear, as I understand your Honor's order, it contemplates continuing disability reviews in the context of -- in the context of -- suggesting that in a potential defense, which the government thought we would have, that the Railroad Retirement Board is negligent, they didn't undercover this. And so in the context of that your Honor said we are going to preclude the discussion about that because it goes to the issue of negligence.

Judge, this does not go to the issue of negligence. This was recently disclosed. And this particular matter, your

Honor, completely goes to the good faith defense that we'll have. And that good faith is that, just as -- just as the people came and said they were disabled to Ms. Baran -- and, in fact, she relying upon those representations and discussions with them completing the application, apparently these people are disabled, and they are disabled because that fact was confirmed by the Railroad Retirement Board themselves.

This is not something that your Honor's order contemplated. This is not something that your Honor had seen. This is something that Mr. Weddle apparently e-mailed your Honor, as he e-mailed to us, these very recent disclosures. And so I don't think that your order at all addressed this issue. And I think not allowing me to bring out this very point that these people are truly disabled completely impairs not only her defense, not only does it allow for an unfair trial but it completely misleads this jury as to what the government is arguing concerning what Ms. Baran did.

So that is the e-mail that Mr. Weddle is referring to. This is something that -- clearly was not something that you were aware of -- we're aware of it now, and that's the e-mail that is being referenced in his discussion regarding this continuing disability review. So just as the government shouldn't be prejudiced, Judge, we shouldn't be prejudiced at all. This is about fairness for everyone.

And certainly in light of this recent disclosure and

in light of independent medical examinations, I should, of course, be entitled to make this jury aware of these very facts.

THE COURT: All right. Thank you.

MR. WEDDLE: All right. Your Honor, this is exactly what I was preparing a letter on, and I can send the letter to your Honor --

THE COURT: All right. Send the letter because I see this just going around and around and around, and I see that Mr. Jackson basically is going through the back door. That is exactly what we are trying to prevent, Mr. Jackson. You are trying to get through the back door.

MR. JACKSON: Judge --

THE COURT: I will not listen to reargument, argument about matters that have been decided.

MR. JACKSON: Judge, I got this Monday. How is this going through the back door when I got this Monday?

MR. WEDDLE: Your Honor, just to respond to this point that Mr. Jackson is making right now. Your Honor took the bench on Monday morning for the start of our trial, and your Honor said, at page 4 of the transcript, line 15, "The Court has also received correspondence from the government dated July 11th, which it is making available to Court and copies to the defendants certain material that it classifies as 3500," and it continues. So this e-mail that Mr. Jackson is talking

about is the same document that your Honor was referencing on Monday morning.

We had this argument on Monday morning. I am drafting a letter explaining the -- I think off the top of my head maybe five or six reasons why everything that Mr. Jackson said here just now is wrong. The continuing disability review documents are contained in the claim files. The claim files were produced in discovery, I believe, in February 2012.

Our fourth production in discovery -- and I apologize, your Honor, I don't know the date of it off the top of my head, but our fourth production of discovery, which is written in my draft letter on my computer, produced separately a compilation of many of the same documents relating to continuation disability reviews. So the defense would have them in one place.

Later, one of the defendants, Mr. Ehrlinger, complained that many claim files were produced in paper format, and he wanted hem to be scanned and produced in a searchable format. The government did that at great expense. The government scanned I believe 1600 claim files and produced them to the defense in searchable format. I believe that production was made either in October 2012 or December 2012.

Simple searches in that material would bring up any information about continuing disability reviews. The same argument that Mr. Jackson is arguing is new and somehow newly

disclosed in the letter that we sent to your Honor on Friday that your Honor mentioned in court on Monday was disclosed in discovery a year-and-a-half ago, was disclosed again in discovery more than a year ago, was expressly argued by Dr. Ajemian at his sentencing, was expressly argued by Dr. Lesniewski in his opposition to our motion, was expressly refuted both in our opposition to Dr. Ajemian's sentencing memo, in our motion in limine, in our reply, and in my remarks on Monday morning. So we're just rehashing the same ground.

I am happy to send the letter, your Honor, but the presentation that we've heard here is alleging some kind of holding back of information by the government, which is completely false, and so I felt like I needed to respond briefly to that point here.

MR. JACKSON: Just quickly. Did we have the e-mails?

MS. FRIEDLANDER: Yes, you had them Friday.

MR. JACKSON: I'm sorry. So we had them Friday after the Judge wrote to me.

MR. DURKIN: Yes.

MR. JACKSON: Just for the record.

THE COURT: For the record, Mr. Jackson, I received the e-mails after the decision had been issued. I reviewed the e-mails over the weekend. On Monday morning I basically acknowledged having received them. And if I had felt that that material had made any difference to the Court's ruling, I would

have at that point indicated so.

I considered the defense arguments on Monday morning as forms of motions for reconsideration. I denied them, having been fully aware of those e-mails at that time. So to that extent those issues are part of the record, part of what I considered, and part of what I denied in reconsideration.

MR. JACKSON: Judge, just for the record. You considered e-mails in your motion -- excuse me, in motions and in a decision that you rendered prior to having received the e-mails.

THE COURT: I didn't say that, Mr. Jackson. Please listen to me carefully. I said that I decided the motion. I subsequently saw the material. Upon considering that material, it did not make a difference to me in my ruling, and therefore considered the ruling as having been reaffirmed and reratified, however you want to characterize it, in the light of that so-called new material.

I said, if that material had made a difference to the Court's ruling, I would have said so on Monday morning when you all presented your requests for reconsideration, which I denied. I could not have denied reconsideration at that point without having been aware that that material was already in the record. It didn't make a difference to my ruling.

MR. JACKSON: Just to preserve the record, Judge, and I will adhere, that you are characterizing what I said as a

motion to reconsider. It was not at all a motion to reconsider or reargue. In my view, it was new information that was injected into this case that was not considered previously, and it is on that basis that I made the arguments.

THE COURT: By its own definition, new evidence submitted after a decision has been rendered is a request for reconsideration, and, in fact, one of the defendants -- it may have been Mr. Lesniewski, Dr. Lesniewski, submitted a reply which it was formally characterized as a request for reconsideration.

All right. If there is nothing else, I will, unfortunately, have to leave for another matter. So thank you.

We'll see you tomorrow at 9 o'clock.

(Adjourned to 9 a.m., Thursday, July 18, 2013)